IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17359 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE N.G.NANDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JETHABHAI AMARDAS LALWANI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 17359 of 2003

MR AR SHAIKH for Petitioner No. 1

MS. PAURAMI SHETH, LD. AGP for Respondent No. 1-3

RULE SERVED for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE N.G.NANDI

Date of decision: 19/02/2004

ORAL JUDGEMENT

1. In this petition under Article 226 of the Constitution of India, the petitioner has been challenging the order of detention No:

PCB/PASA/DTN/91/03 dated 17-8-2003 (Annexure-A) under section 3 (1) of the Prevention of Anti Social Additivities Act, 1985 (PASA Act) passed by respondent no.2 and prays for quashing and setting aside the said detention order.

2. The grounds of detention Annexure-C suggests that 3 cases under the provisions of Bombay Prohibition Act have been registered against the petitioner on different dates; that the petitioner is alleged to be a very head-strong person keeping deadly weapons and dealing in sale of country liquor in the area around Baroda City; that two unregistered cases also came to be filed against the petitioner under the provisions of the Bombay Prohibition Act alleging the illegal sale of country liquor. The statements of two witnesses have been recorded for the incident of 10-8-2003 and 11-7-2003.

3. The witnesses are said to have expressed apprehension of damage to their person and property and for the purpose of invoking privilege under section 9 (2) the detention order suggests that, on verification of apprehension by the petitioner same has been found to be true and there are reasons to withhold identity of the witnesses and therefore it is necessary to invoke section 9 (2) in public interest.

4. Ms. Banna Dutta learned advocate for the petitioner assailing the detention order (Annexure-A) contends that there is no contemporaneous material to reach the subjective satisfaction that what is alleged against the petitioner by the witnesses in unregistered cases is true and the fear expressed is genuine; that mere statement of the witnesses recorded by the police authority and verified by the detaining authority are not enough to reach the satisfaction about the compliance with the requirement of section 9 (2) of the Act.

5. It is submitted by Ms. Paurami Sheth, learned AGP that, it cannot be said that there was no contemporaneous material before the detaining authority and the detaining authority has verified the allegations made in the statements after calling the witnesses in person and on the basis of the verification the allegations levelled against the petitioner, the apprehension expressed by the witnesses have been found to be true and genuine and therefore; privilege under section 9 (2) has been exercised in public interest. It is further contended that, there cannot be any other material except the statements of the witnesses because if the detaining authority goes and verifies the contends

of the statements in the surrounding area, then, the identity of the witnesses would be disclosed.

6. As far as the availability of other contemporaneous material is concerned, it may be seen that just as the identity of the witness making statement before the police authority and verified by the detaining authority could be withheld, the identity of the witnesses on veracity of the incidents could also be withheld. In my view, the identity including the names & addresses of the witnesses of surrounding area for the veracity of the incident could equally be withheld invoking the privilege under section 9 (2) of the Act, and therefore it cannot be said that there cannot be any other contemporaneous material in such cases except the statement of the witnesses whose statements have been verified by the detaining authority.

7. As far as invoking of the privilege under section 9 (2) of withholding identity of the witnesses whose statements have been verified by the detaining authority is concerned, it is suggested from page-37 of the paper book which is the verification of the statement of the witnesses of the detaining authority, that the same is nothing but reiteration of what the witnesses have stated before the police authorities. As far as the veracity of the incident is concerned, it may also be seen that the verification only refers to the activities of the petitioner detenue in general without referring to any particular incident and there is no verification as far as the veracity of activity / incident is concerned, because there is no allegation of any particular incident against the petitioner by he witness during the verification before the detaining authority.

8. In the case of KAJALBEN G. SINDHI VS. COMMISSIONER OF POLICE, AHMEDABAD & ORS. 2000 (2) GLR pg. 1296, the Division Bench in para-11 and 12 observed as under :-

" Para-11: As observed by a Division Bench this Court in Bai Amina v. State of Gujarat, 1981 GLR 1186, the mere fact that the relevant particulars and materials were furnished to the detaining authority in confidence by some person is not by itself, a sufficient ground for withholding the disclosure of such particulars and materials, if they have been relied upon against the detenu and their disclosure would assist the detenu in making effective representation against his detention. It was also observed that it was the

satisfaction for the detaining authority himself that apprehension expressed by informant is honest, genuine and reasonable in the circumstances of the case. General background, character, antecedents, criminal tendency or propensity etc. of the detenu and such of those matters as are relevant in the context of the informant must be inquired into and carefully examined by he detaining authority with a view to satisfying itself that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant. Relying upon the decision of the Supreme Court in Ganga v. State of Maharashtra, AIR 1980 SC 1744, the Division Bench observed that having regard to the seriousness of the question involved, the detaining authority would be well advised to make a contemporaneous record of the grounds and reasons which weighed with it in withholding the documents, statements, materials and particulars.

In para-12 it is observed :-

" Law laid down in Bai Amina (supra) came to be confirmed by Full Bench of this Court in Chandrakant N. Patel v. State, 1994 (1) GLR 761.

In the instant case, not only there is nothing in the contemporaneous record with regard to formation of such opinion or satisfaction regarding withholding for names and material particulars by the detaining authority, but nothing is stated in the grounds of detention. On the contrary, in the affidavit-in-reply in para 10, the detaining authority has stated that he was subjectively satisfied that if the detenu, their lives and properties would be in danger. It was further stated that witnesses were not coming forward to register any complaint because of fear and apprehension of insecurity to their lives and properties. Looking to the record, it appears that it was not stated by the witnesses themselves that there would be damage to their properties. It is also not stated by he detaining authority in the order or even in the grounds of detention and that ground was probably stated for the first time in the affidavit-in-reply.

In our opinion, therefore, the case is squarely covered by Bai Amina (supra) as affirmed by the Full Bench. "

9. In the case of KISHOR NAGINBHAI PARMAR V. STATE OF GUJARAT & ORS. 2000 (4) GLR pg. 3236, it has been held that, a mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witness, can be of no virtue in absence of contemporaneous material, and therefore the detention order for want of proper exercise of powers under section 9(2) of the PASA Act stand vitiated; because the same would have the effect of infringement of constitutional right of the detenu of making an affective representation due to non disclosure of the names of the witness.

In para-14, it has been observed that, the order of detaining authority and the grounds of detention do not indicate the basis of arriving at the subjective satisfaction. A mere statement about having verified the veracity, genuineness and correctness of the fear expressed by the witnesses can be of no avail in absence of contemporaneous material.

10. In the instant case except a statement about having verified the veracity, genuineness and correctness of statement and fear expressed by the witnesses, there is no contemporaneous material to reach subjective satisfaction as required under section 9 (2) of PASA Act.

11. In the above view of the matter, the impugned detention order is liable to be quashed and set aside and the petitioner detenu is required to be set at liberty.

12. In the result the petition is granted and accordingly allowed. The impugned detention order No: PCB/PASA/DTN/91/2003 dated 17-8-2003 (Annexure-A) passed under section 3 of the Prevention of Anti Social Activities Act, 1985 by Respondent no.2 is quashed and set aside. The petitioner detenu - Jethabhai Amardas Lalwani is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute accordingly. Direct service permitted.

Dt: 19-2-2004 (N.G. Nandi, J)

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